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IN THE

Supreme Court of the United States

October Term, 1984

THE CITY OF McKEESPORT and
WILLIAM WEISSERT,
Petitioners.

vs.

REBECCA L. CUNNINGHAM, an individual,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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HOPP

Questions Presented for Review

I. Whether the decision of the United States Court of Appeals for the Third Circuit in applying the standards of *Lindy Brothers, Inc. v. American Radiator and Standard Sanitary Corporation*, 540 F.2d 102 (3rd Cir. 1976), thereby dictating the amount of attorney's fees is so far a departure from the body of federal law governing the award of attorney's fees in Civil Rights cases and so repugnant to the intention and spirit of the Civil Rights Act as a whole as to warrant this Court's power of supervision?

II. Whether the decision of the United States Court of Appeals for the Third Circuit is in conflict with another decision of the Third Circuit setting forth the standard of review and, in fact, ignored that standard? *Silberman v. Bogle*, 683 F.Supp. 62 (3rd Cir. 1982).

List of Parties

PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT DISMISSED PRIOR TO TRIAL

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Joseph P. Graziano
James Heatherington
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Opinions Below

The Opinion of the United States Court of Appeals for the Third Circuit is not reported but appears in the Appendix at pages 1a-14a.

The statement of the United States Court of Appeals for the Third Circuit "Sur Petition for Rehearing" is not reported but appears in the Appendix at pages 15a-18a.

The Opinion of the United States District Court for the Western District is not reported but appears in the Appendix at pages 19a-24a.

Statement of Jurisdiction

The decision of the Court of Appeals was issued on January 15, 1985. A Petition for Rehearing was timely filed and denied on February 13, 1985. This Petition for Writ of Certiorari has been filed within ninety (90) days of that date. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved

None.

Statutes Involved

The Civil Rights Attorney's Fees Award Act of 1976 provides as follows:

> "... The Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988.

Statement of the Case

This is a civil action for damages brought pursuant to the Civil Rights Act of 1871, 42 U.S.C., Section 1983 by an individual against the City of McKeesport and ten other defendants. (Prior to the trial, all but four of the defendants were dismissed.)

Respondent claimed damages as the result of the March, 1981 demolition of an uninhabited and previously condemned house and garage owned by her. She paid $2,700.00 for the property and had invested approximately $2,000.00 in its renovation at the time of its demolition. She proposed to invest another $15,000.00 in the property, by way of a federal IMPAC loan, in order to make the house inhabitable.

Respondent claimed her civil rights had been violated as a result of the demolition. Petitioners never contested that the house and garage had been demolished by the City of McKeesport, rather, they contested whether or not such actions amounted to a violation of plaintiff's civil rights and also contested the amount of damages claimed by Respondent.

Respondent's initial demand to settle the case was $57,800.00. She based this demand on her estimate of the post-renovation fair market value of the house and garage as being $40,000.00. She also included the "loss of use" of the $15,000.00 IMPAC loan, even though she had never received the funds, nor was ever obligated to repay them. She also claimed damages of $250.00 per month for apartment rental for herself and the loss of income of $50.00 per month for garage rental which she allegedly would have secured after renovation.

Prior to trial, Petitioners offered $15,000.00 to settle the case, which was refused. The District Court ruled, also prior to trial, that the $40,000.00 estimate of the post-renovation fair market value of the property was not a proper item of damage. Respondent refused to accept the $15,000.00 up to and through trial and was ultimately awarded $17,000.00. Neither Respondent nor Petitioners filed an Appeal from this Award. Respondent subsequently filed for attorney's fees in the amount of $33,887.50.

Petitioners contested Respondent's right to attorney's fees based on the Federal Court decisions regarding denial of attorney's fee Awards in cases similar to Respondent's. In the alternative, Petitioners challenged the amount of fee requested based on the Federal Court decisions regarding the relation between the nature and amount of benefit conferred on the plaintiff and the amount of fees requested.

The District Court Judge, in March of 1984, who handled the entire matter from the filing of the suit, through discovery and trial, awarded $5,875.00 in attorney's fees, plus costs. Petitioners, in the interest of terminating what had already become protracted litigation, did not appeal this Award. Respondent did appeal the Opinion of the District Court Judge, which was reversed, and although there is some confusion as to the amount of attorney's fees ordered by the Third Circuit, it appears that the minimum amount is $31,225.00.

Respondent's attorneys have already petitioned the District Ccurt for an additional $7,493.70 for time and costs expended on their Appeal.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court below in applying *Lindy Brothers, Inc. v. American Radiator and Standard Sanitary Corporation,* 540 F.2d 102 (3rd Cir. 1976) (*en banc*) is so far a departure from the recognized body of federal law governing the amount of attorney's fees in civil rights cases and is so repugnant to the intention and spirit of the Civil Rights Act as a whole, as to warrant this Court's power of supervision.

The case before this Court is an example of the judicial process run amok and the nightmare of litigation which continually erodes and undermines the legitimacy of and confidence in the American legal system as a whole.

42 U.S.C. Section 1988, *et seq.*, makes it clear that an award of attorney's fees is meant to be compensatory rather than punitive. The decision of the Court below is so clearly designed to be punitive in nature, as to virtually preclude the future defense of cases such as the one at hand.

Briefly, Petitioners mistakenly demolished two structures owned by Respondent. She sustained approximately $4,700.00 of actual damages. Yet, with the assistance of legal counsel, she demanded a settlement in excess of $57,000.00 up to and through trial, based upon items of damages which were obviously improper and largely unsubstantiated.

Petitioners *never* contested their liability for the demolition. The only hotly contested issues, pressed unrelentingly, by the Respondent, were that (1) the actions of Petitioners amounted to a civil rights violation, and (2) she was entitled to show a jury unsubstantiated damages which were more than ten times the amount she actually sustained.

The entire lawsuit was never handled with an eye towards restoring to plaintiff that which she had lost, rather, it was prosecuted solely to avail Respondent and her counsel of the protective cloak of the Civil Rights Act and the recovery of a windfall, both for Respondent in the amount of damages claimed and her attorneys, in run-a-way legal fees.

Petitioner's refusal to submit to the demand, which was ultimately vindicated by an award to Respondent almost identical to the offer, has cost them the penalty of paying the attorney's fees generated by Respondent's unreasonable and unrealistic prosecution of her claim.

Such a penalty, in reality, precludes the defense of cases such as these where the plaintiff can prove a civil rights violation in only the most technical sense. Once a plaintiff has crossed this hurdle, the demand can be totally unrelated to the damages and he or she can refuse to compromise, proceeding to trial without consideration of the legal costs or time involved. The decision of the lower Court condones and implicitly encourages the unreasonable and unrealistic prosecution of suits by rewarding Respondent for such activity and penalizing Petitioners for their unwillingness to submit to such demands.

The excessive amount of legal time incurred in this case was entirely due to Respondent's insistence that she was entitled to recover more than ten times the amount of damages she sustained.

The Trial Judge in the Western District was aware of this and had firsthand knowledge of the posture assumed by plaintiff throughout the litigation, and reduced the Fee Petition accordingly.

The strict and wooden application of *Lindy, supra,* by the Circuit, with respect to the hourly rate and the multiplier, ignores the fundamental purpose and intent of the attorney's fee statute and imposes a punitive measure on Petitioners.

Federal Courts have consistently recognized that many factors can and should be considered in determining an appropriate fee Award. Among these have been:

> (1) Whether there was a single violation for which plaintiff was adequately compensated; *Buxton v. Patel,* 595 F.2d 1182 (9th Cir. 1979).
>
> (2) Whether the interests of the public or any identifiable group has been advanced by the litigation; *Zarcone v. Perry,* 581 F.2d 1039 (2nd Cir. 1978).
>
> (3) Whether the plaintiff was acting as a "private attorney general"; *Zarcone, supra.*
>
> (4) Whether the amount of fees requested bears any relation to the results obtained; *Hughes v. Repko,* 578 F.2d 483 (3rd Cir. 1978); on remand, 471 F.Supp. 43 (1978).
>
> (5) Whether the case is merely one of disguised negligence; *Martin v. Hancock,* 466 F.Supp. 455 (D. C. Minn. 1979); *Arroyo v. Walsh,* 317 F. Supp. 869 (D. Conn. 1970).

In the instant case, all of these factors were considered by the Trial Judge in an effort to make a rational, sensible fee Award. Respondent proved only a single violation (hers) and received almost four times her actual damage. She was thereby more than adequately compensated. She produced no evidence that women or purchasers of condemned housing were having their property destroyed by Petitioners, thereby entitling her to the status of a "private attorney general", advancing

the interests of an identifiable group or the public in general. Also, the amount of the fee Award requested was in no way reasonably related to the results obtained, being almost twice Respondent's award. Further, it can hardly be argued that Respondent's claim against Petitioners was any more than a simple, straightforward tort claim.

The body of federal law governing the Award of attorney's fees clearly does not sanction the decision of the lower court.

Federal Courts have consistently held that the Civil Rights Act overriding purpose is to "... encourage the private enforcement of Civil Rights laws in order to fully vindicate the federal rights involved." *Buxton, supra,* p. 1184. It was never intended to provide access to the Federal Courts for ordinary negligence cases.

The decision of the Third Circuit has sent a message to attorneys that any tort case which can be brought against an individual or entity acting under color of state law will be recognized under the Act and afforded all of the protections and remedies which Congress has deemed necessary to protect the fundamental rights of citizens in a democracy.

Petitioners submit that such a message will cause a flood of simple negligence cases, such as the one now before the Court, to pour into the Federal Courts, seeking escape from the standards of proof imposed in tort cases and the defenses normally available in such cases.

Such a decision demeans and eviscerates the intention and spirit of the Civil Rights Act by equating actions such as the ones at hand with those designed to systematically rob the citizenry of its constitutionally protected rights.

Indeed, the major purpose of establishing a federal cause of action for deprivation of civil rights was to prevent further deprivations rather than to simply compensate citizens for wrongs that had already been suffered.

For this reason, Petitioners submit that the decision below has wiped out an entire body of federal law with respect to the acceptable parameters of awarding attorney's fees and has denigrated the intentions of the Civil Rights Act to a codification of simple tort liability. For these reasons, the powers of supervision of this Court are necessary.

II. By substituting its judgment for that of the District Court, the decision of the lower court is in conflict with another decision of that Court which sets forth the standard of review and, in fact, ignored that standard.

It is inconceivable that the Third Circuit believes that no reasonable man would find acceptable the District Court's award of approximately one-third the amount of the verdict to Respondent's attorneys as a fee. *Silberman v. Bogle, supra,* clearly states that this is the permissible standard of review of the Circuit Court.

The Third Circuit made much ado about the standards in *Lindy, supra,* not being applied by the Trial Judge. This justification for giving Respondent's attorneys in excess of $30,000.00 is a tortious exercise in elevating form over substance, since the Opinion of the District Court very clearly states that those standards were considered. The Third Circuit is not permitted to substitute its own judgment for that of the District Court simply because it does not find favor with the results of the application of those standards.

This Honorable Court, very recently, discussed the importance of protecting the discretionary power of the District Court in awarding attorney's fees. *Hensley v. Eckerhart*, _____ U.S. _____, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983) states that this discretionary power is appropriately vested in the District Court in view of its superior understanding of the litigation and the desirability of avoiding frequent Appellate review of what are essentially factual matters (p. 1941).

Petitioners submit that the lower Court's decision is a clarion call to all attorneys that the last restraints on the unbridled use of legal time on the most trivial of claims have been removed. There is now, absolutely no incentive, to accept as final the decision of the District Court if it does not compensate an attorney for every dollar they choose to chalk up to a file.

The lower Court's decision strips the District Courts of their discretionary power and calls for them to guess at what the Circuit will find acceptable in the way of attorney's fees. It is, indeed, a warm invitation to attorneys to appeal any Award of attorney's fees that they find unpalatable.

At a minimum, if the Circuit looked with disfavor on the methods of the District Court in awarding fees to Respondent's attorneys, it should have ordered that Court to rehear the Petition, rather than arbitrarily impose its own judgment. In failing to do so, it destroyed the carefully crafted parameters of the District Court's discretionary powers as set forth in *Silberman, supra,* and *Hensley, supra,* and substitutes Appellate review by fiat.

The quagmire in which Petitioners now find themselves will become commonplace, further fueling public criticism of its legal system as unresponsive, unwieldy and unjust. The bizarre result of facing what has now escalated to over $40,000.00 of attorney's fees on a simple tort claim with property damage of only $4,700.00, exemplifies all of the worst that can be said about the judicial system and the practitioners who move within it.

It is for this reason that the Court with the most intimate knowledge of the litigation *must* be permitted to exercise its discretion with respect to these matters. A little knowledge is a dangerous thing and, indeed, the little knowledge brought to the Circuit Court in this case, has wrought the ultimate danger—an absolutely ludicrous and irrational result.

The decision also directly conflicts with the law that the Circuit had previously set out in *Silberman, supra,* which was approved by this Honorable Court in *Hensley, supra.*

Conclusion

For these reasons, a Writ of Certorari should issue to review the decision of the Court of Appeals for the Third Circuit and upon review that judgment should be reversed.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated January 15, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3209

REBECCA L. CUNNINGHAM, an individual,
Appellant

v.

THE CITY OF McKEESPORT, WILLIAM WEISSERT, SAMUEL R. VIDNOVIC, GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES HEATHERINGTON, CHARLES A. SHARBAUGH, NICHOLAS J. SKEZAS, CAROLYN O. YOUNG and OMSLAER WRECKING CO., ROBERT CLYDE OMSLAER t/d/b/a OMSLAER WRECKING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA - PITTSBURGH
(D.C. Civil No. 81-1434)

ARGUED October 25, 1984
Before GIBBONS and BECKER, *Circuit Judges*, and KATZ, *District Judge**

(Opinion filed January 15, 1985)

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* Hon. Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated January 15, 1985.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Rebecca Cunningham, a successful plaintiff in a civil action brought pursuant to 42 U.S.C. § 1983 (1982) against the City of McKeesport, Pennsylvania, its building inspector, and others, appeals from the judgment awarding attorneys' fees. Pursuant to 42 U.S.C. § 1988 (1982), she requested a fee award of $35,887.50. The court awarded $5,875.00. Cunningham contends that the court erred in reducing the requested fees to this extent. Because the court did not properly apply the standards applicable for statutory fee awards in this circuit, we reverse.

I.

The Underlying Case

Cunningham, in 1980, purchased an unoccupied house and garage in the City of McKeesport from the United States Department of Housing and Urban Development for $2,700. Cunningham made some minor repairs. She then applied for a subsidized loan

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from the Improvement Program of Allegheny County (IMPAC) Which approved a $15,000 interest-free loan to be repaid in fifteen years. Cunningham, intending to live in this house, then contracted to have the property rehabilitated for $15,000. Before the rehabilitation work could be commenced, without prior notice to Cunningham, the City of McKeesport demolished the house and garage.

To seek redress, Cunningham retained the Pittsburgh firm of Nernberg & Laffey which accepted her case on a contingent fee basis. It assigned primary responsibility to an associate, James R. Cooney, who, after investigating the circumstances leading to the demolition, filed a complaint on her behalf charging that the defendants had deprived her of property without due process. The complaint sought recovery for the post-renovation market value of the house, for loss of the opportunity to receive the $15,000 interest free loan, for emotional distress, and for punitive damages. The defendants contested both liability and damages, and asserted several affirmative defenses including immunity. Both parties engaged in extensive discovery. At a pretrial conference the trial court ordered that briefs be filed on a number of contested issues, and that the parties submit proposed points for charge with legal citations for each point raised.

Trial began on April 12, 1983 and continued through April 15, 1983. At the end of the plaintiff's case the trial court directed a verdict in favor of some defendants. The trial continued against the City, the building inspector, and the demolition contractor. The case was submitted to the jury on special verdict interrogatories. The jury returned a verdict in favor of the demolition contractor, but against the City and the building inspector. It found that these defendants had deprived her of property without due process of law in violation of 42 U.S.C. § 1983. In answer to the question

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"[w]hat was the market value, if any, of plaintiff Rebecca Cunningham's house and garage immediately prior to demolition?" the jury answered $20,000. In answer to the question "[w]hat damages, if any, is plaintiff Rebecca Cunningham to recover for the loss of the IMPAC loan?" the jury answered $15,000. Thus the verdict would support a judgment in Cunningham's favor for $35,000.

Following the verdict the City and the building inspector moved for a new trial on the ground that the court erred in admitting testimony concerning the interest-free loan. They also moved for a remittitur on the ground that the jury verdict finding a value of $20,000 for the house and garage was not supported by the evidence. They urged, as well, that the court committed several trial errors requiring a new trial. Cunningham moved to amend the verdict to include pre-judgment interest. The trial court, by order, directed that the parties file briefs on these motions.

In its ruling on the post-trial motions the trial court declined to award Cunningham pre-judgment interest, reduced the award for destruction of the house and garage to $17,000.00, and held that the value of the interest-free loan was not a proper element of damages. It denied the defendants' motion for a new trial. Judgment was entered in Cunningham's favor against the City and the building inspector for $17,000. Neither party has appealed from this part of the judgment although counsel for Cunningham advised her that the verdict should not have been reduced.

II.

The Fee Award

Cunningham filed a timely motion, pursuant to 42 U.S.C. § 1988 (1982) for an award of counsel fees. In support of that motion she filed the affidavit of James

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R. Cooney. That affidavit states in detail the number of hours spent by Cooney in various stages of trial preparation and trial. Cooney claims he spent 50 hours prior to filing the complaint, 247.75 hours in pretrial discovery activities, trial preparation, and trial, and 16.75 hours on post-trial motions; a total of 314.50 hours. In addition, W. Thomas Laffey, a partner in Nernberg & Laffey, spent 11.5 hours in trial preparation activities. Laffey also spent 32 hours giving direction and supervision to Mr. Cooney, for which no compensation was sought.

Cooney's affidavit states that "[t]he ordinary billing rate for work performed by Mr. Cooney during the course of this case was $100.00 per hour, and the ordinary billing rate for work performed by Mr. Laffey during the course of this case was $125.00 per hour all on a monthly basis." Cooney Affidavit, App. 55a. It also states that "[o]f the total work performed by Nernberg & Laffey, approximately 75% of the work is performed on a per hour basis, with the balance of approximately 25% of the work performed being in the nature of personal injury/contingent fee litigation. During the pendency of this case, a substantial amount of the work performed and hours expended on this matter were diverted from other work pending in the office which could have been billed at a per hour fee charge." Cooney Affidavit, App. 56a.

The defendants filed no affidavits in opposition to the motion for an award of counsel fees, and did not seek an opportunity to cross-examine Cooney on his affidavit. Thus no challenge was made to the accuracy of the Cooney affidavit. Instead a brief was filed advancing two legal arguments. Defendants contended, first, that since Cunningham had agreed to a contingent fee arrangement, she should not be permitted to recover a fee under section 1988. Alternatively they argued that since Cunningham was

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pursuing vindication of her own civil rights, not those of the public at large, she is not entitled to a section 1988 award.

Despite the fact that Cooney's affidavit was uncontradicted, on February 14, 1984, the trial court ordered that counsel for Cunningham file a supplemental affidavit setting forth the precise number of hours devoted to specific tasks. The court also ordered disclosure of the contingent fee agreement. Counsel complied with this order, filing a new affidavit on March 6, 1984. No opposing affidavit was filed by the defendants; no request was made to cross-examine Cooney; no further briefing occurred; no argument was held. On March 19, 1984 the court entered an order awarding $5,875.00.

In justifying this figure the trial court disallowed all but 219 hours of the time set forth in Cooney's affidavit. Moreover it disregarded Cooney's sworn statement that Nernberg & Laffey ordinarily billed $100 per hour for his time, awarding instead, $50 per hour. This produced a lodestar calculation for time spent on the case of $10,950, which was then reduced by 50%. In supporting that downward adjustment the court reasoned:

> The *Lindy* amount as calculated above will be subject to a post-*Lindy* discretionary adjustment. *See, Ursic v. Bethlehem Mines*, 719 F.2d at 677. Plaintiff's counsel did not successfully advance new law which might serve the public interest in the future. The decision affected only an individual plaintiff who was subject to an isolated act of deprivation for which she was adequately compensated. Ther was no indication of bad faith in defense of the action. *See Swicker v. William Armstrong & Sons, Inc.*, 484 F. Supp. 762, 766 (E.D. Pa. 1980). In light of these considerations, a reduction of the *Lindy* amount by 50% to $5475 is fair and equitable in this case.

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App. 80a. Cunningham requested compensation for 15 hours devoted to prosecution of the fee petition. The court concluded that only 8 hours should reasonably have been devoted to that task, and awarded $400. Thus the total award was $5875.00.[1]

III.

Our Ruling

It has long been settled in this court that the standards for resolution of disputes over attorneys' fees in statutory fee cases are those first announced for fund in court cases in *Lindy Bros. Bldrs., Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973) (*Lindy I*).[2] Recently we resurveyed those standards in *In re Fine Paper Antitrust Litigation*, No. 83-1311 (3d Cir. December 13, 1984). Under the governing law in the Circuit the judgment of the district court must be reversed.

A. Calculation of the Lodestar

Disputes over awards of attorneys' fees, whether in equitable fund cases or in statutory fee cases, must be resolved in a manner which affords the parties an

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1. The defendants' first legal argument, that Cunningham should not recover under 42 U.S.C. § 1988, but should be relegated to her contingent fee arrangement, would have produced a fee for Nernberg and Laffey of $5666.66. Such an arrangement would, of course, have reduced Cunningham's recovery by that amount.

2. *See* Merola v. Atlantic Richfield Company, 493 F.2d 292 (3d Cir. 1974), 515 F.2d 165 (3d Cir. 1975); NBO Industries Treadway Cos., Inc. v. Brunswick Corp., 523 F.2d 262, 279 (3d Cir. 1975), *vacated on other grounds sub nom.* Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977); Pitchford v. Pepi, Inc., 531 F.2d 92, 109 (3d Cir. 1976); Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978); Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208 (3d Cir. 1978); Inmates of Allegheny County Jail v. Pierce, 716 F.2d 177 (3d Cir. 1983); Danny Kresky Enterprises Corp. v. Magid, 716 F.2d 215 (3d Cir. 1983); Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983).

EDITOR'S NOTE

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opportunity for a hearing to present evidence on disputed issues of fact as to what hours should be included in the lodestar amount. *Id.* slip op. at 39. In statutory fee cases, however, when an opposing party has been afforded the opportunity to raise a material fact issue as to the accuracy of representations as to hours spent, or the necessity for their expenditure, and declines to do so, no reason occurs to us for permitting the trial court to disregard uncontested affidavits filed by a fee applicant. In fund in court cases, because of the potential for conflicts of interest between the attorneys seeking compensation and their clients, the trial court has an independent duty to scrutinize fee applications. Even in that situation we have consistently held that there must be a record basis for the court's rulings. That is *a fortiori* the case where, as here, the fee proceeding is genuinely adversarial.

We recognize that in some respects fee applications involve matters of which the trial court has personal knowledge. That is true here, however, only with respect to the time spent in pretrial conferences and in trial. Of the fifteen categories of activity for which lodestar time was disallowed, only three are activities as to which the court arguably had personal knowledge. These activities are a status conference for which Cunningham seeks 1.5 hours, but for which the court allowed .5 hours; a pretrial conference for which she sought 3.75 hours but was allowed 1 hour; and the trial, over 4 days, for which she sought 32 hours, but was allowed 22. Even as to these activities the trial court did not make an explicit finding that the 13.75 disallowed hours were not in fact expended on the case. Nevertheless, while explicit findings as to these hours would be preferable, we cannot find an abuse of discretion, given the trial court's proximity to these phases of the litigation. As to the remaining lodestar time disallowed, there is simply no record basis for the disallowance. The activity categories in question all

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involved activities outside the presence of the court; the defendants never put in issue the accuracy of Cooney's affidavits. The trial court states that "[t]aking into consideration the experience of counsel, as discussed below, nonetheless the 318.5 hours spent were excessive and duplicative." App. 78a. There are no subsidiary findings in support of this conclusory statement, and there is no evidence in the record which would support such findings had they been made.

The fee applicant would have been entitled to offer evidence in support of the reasonableness of her request had the defendants put in issue either the fact that certain time had been spent, or the necessity for doing so. *In re Fine Paper*, slip op. at 38-39. No such opportunity was afforded here, because the defendants filed no opposing affidavits and sought no evidentiary hearing. Instead, they opposed the fee application on two legal grounds, one of which the trial court did not adopt.

On this record, therefore, we must hold that the trial court erred in reducing the lodestar amount from 314.50 hours for Mr. Cooney's time and 11.5 hours for that of Mr. Laffey, to a total of 219 hours for Mr. Cooney's time alone.[3]

B. Use of Hypothetical Time Charges

In the seminal *Lindy I* opinion this court held that the value of an attorney's time is generally reflected in his normal billing rate. Our premise was then, and still

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3. The city made no contention in the district court that the fee award should be allocated between time spent prosecuting the property damage claim and that spent on the loss-of-loan claim, and thus the trial court did not consider that issue. Since it was not raised in the trial court or addressed here, we do not consider it. The attorneys for Cunningham state that the court erred in reducing the verdict by $15,000, but, as we have noted above, that issue has not been appealed.

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is, that the reasonable value of an attorney's time is the price that time normally commands in the marketplace for legal services in which those services are offered. Within the month we have reiterated that rule. *In re Fine Paper*, slip op. at 52-54.

Cooney's affidavit to the effect that his firm normally bills his time at $100.00 per hour is on this record uncontradicted. The trial court took judicial notice that in the Western District of Pennsylvania able and experienced trial counsel charge $100 per hour, and observed that Cooney is relatively inexperienced. But while he must be inexperienced, since he is a recent law school graduate, there is nothing in this record casting any doubt upon the truth of the representation that his firm bills $100 per hour for his time. Attorneys are not fungible. Some, shortly out of law school, may command in the marketplace charges for their time that others do not command after a lifetime of pedestrian practice. From *Lindy I* through *In re Fine Paper* we have consistently held that the lodestar calculation must be based on historical time charges for individual attorneys. What those time charges are is a factual question. Since Cooney's affidavit is uncontradicted, there is no material issue of fact. The lodestar for his time should have been calculated at $100 per hour.

C. The Negative Multiplier

In *Lindy I* this court held that an affirmative or negative multiplier could be applied to the lodestar amount after consideration of ". . . the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained." 487 F.2d at 168. We have also held that "[t]he heavy burden of proving entitlement to such an adjustment is on the moving party." *Lindy II*, 540 F.2d at 118. In this instance the

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defendants made no effort, factually, to carry that burden. Instead they made two legal arguments.

The first argument, rejected by the trial court without discussion, is that Cunningham should not receive a fee award under section 1988 because she found an attorney who was willing to undertake her case on a contingent fee basis. The court's decision is in this respect unquestionably sound. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *amending* 42 U.S.C. § 1988, was passed to overrule the holding in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that the called "American Rule" barred an award of counsel fees to successful litigants, insofar as it applied to civil rights cases. The statute contains no contingent fee exception. *Buxton v. Patel*, 595 F.2d 1182, 1185 n. 3 (9th Cir. 1979); *Sargent v. Sharp*, 579 F.2d 645, 648 (1st Cir. 1978).

The second argument, predicated on *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), is that because Cunningham sought recovery for herself alone she was not acting as a "private attorney general," vindicating interests of the public at large, and thus an award of fees is unnecessary to achieve the purpose of the Civil Rights Act. The trial court appears to have relied on this argument in reducing the lodestar amount by 50 per cent.

We review quality multiplier determinations for abuse of discretion. In reviewing the exercise of discretion in light of supportable factual premises, we must consider whether the court has taken into account properly relevant considerations. When a trial court gives weight to improper considerations it abuses its discretion or commits legal error. *In re Fine Paper*, slip op. at 39; *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 263, 265, 277, 302 (3d Cir. 1983).

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We find such an abuse in this case. We start with the observation that civil rights are held not by the public at large, but by individuals. Some rights, such as those protected by the first amendment, are enjoyed by individuals in common with other individuals. Others, such as property rights, are in their nature singular; their very definition denotes singularity. Thus a claim that property has been destroyed by the state without due process of law will always present a claim unique to the plaintiff. Such uniqueness does not, however, place it outside the ambit of the Civil Rights Act of 1871 or the Civil Rights Attorney's Fee Awards Act of 1976. No case in this court has ever suggested that a negative quality multiplier may be applied to a fee award simply because the civil right in question was by its nature singular to the plaintiff. If the Second Circuit case of *Zarcone v. Perry*, on which the defendants rely, suggests otherwise, that viewpoint has never been espoused by this court. Moreover even in the Second Circuit the Court of Appeals has not interpreted *Zarcone v. Perry* as a holding that under section 1988 attorneys' fees should be denied on the basis of the "private" nature of the lawsuit. *Wheatley v. Ford*, 679 F.2d 1037, 1040 (2d Cir. 1982); *Milwe v. Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981).

The trial court also mentioned that "[t]here was no indication of bad faith in the defense of the action." Whatever weight the defendants' good faith may have in considering a contingency multiplier, it is entirely irrelevant to a negative multiplier. Obviously Congress, when it passed the Civil Rights Attorney's Fees Awards Act of 1976 contemplated that civil rights cases would be defended in good faith. The risk that such defense will result in the expenditure of time by attorneys for plaintiffs has, however, been allocated by Congress to the party asserting the defense. The statute does not require a finding of bad faith, and cannot be interpreted as permitting the reduction of an otherwise

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proper lodestar amount because of good faith.

Finally, the trial court spoke of a "post-*Lindy* discretionary adjustment." If the trial court assumed that the carefully crafted set of rules for the exercise of district court discretion in fee award cases which this court worked out in *Lindy I* and *Lindy II* has been abandoned in favor of some standardless rule of district court gestalt, that assumption is incorrect. *See In re Fine Paper*. As we said in *Prandini v. National Tea Company*, 585 F.2d 47, 52 (3d Cir. 1978):

> . . . district courts, in awarding attorneys' fees, may not reduce an award by a particular percentage or amount (albeit for justifiable reasons) in an arbitrary or indiscriminate fashion. If the court believes that a fee reduction in the lodestar is indicated, it must analyze the circumstances requiring the reduction and its relation to the fee, and it must make specific finding to support its action.

To what we said in *Prandini* we add that findings must be supportable in the fee application record. *In re Fine Paper*, slip op. at 38-39.

IV.

Conclusion

On this record the trial court erred in reducing the lodestar hours, in applying a rate other than the hourly rate regularly charged by the attorneys in question, and in applying a 50 per cent negative multiplier. Since on this record the lodestar calculations were undisputed, and the legal arguments advanced by the defendants for disallowance of fees are meritless, judgment should have been entered for the lodestar amount. The judgment appealed from will be reversed and the case remanded for the entry of a judgment consistent with this opinion.

Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated January 15, 1985.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Statement of the United States Court of Appeals for the Third Circuit, "*Sur* Petition for Rehearing" No. 84-3209, dated February 13, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3209

REBECCA L. CUNNINGHAM, an individual,
Appellant

v.

THE CITY OF McKEESPORT, WILLIAM WEISSERT, SAMUEL R. VIDNOVIC, GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES HEATHERINGTON, CHARLES A. SHARBAUGH, NICHOLAS J. SKEZAS, CAROLYN O. YOUNG and AMSLAER WRECKING CO., ROBERT CLYDE OMSLAER t/d/b/a OMSLAER WRECKING COMPANY

(D. C. Civil No. 81-1434)

SUR PETITION FOR REHEARING

Present: SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and KATZ, *District Judge*•

• Hon. Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, on panel rehearing only.

Statement of the United States Court of Appeals for the Third Circuit, "Sur Petition for Rehearing" No. 84-3209, dated February 13, 1985.

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The petition for rehearing filed by appellees, City of McKeesport and William Weissart, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

John J. Gibbons

Judge

Dated: February 13, 1985

STATEMENT BY JUDGE ADAMS
SUR DENIAL OF PETITION FOR REHEARING

In this case the plaintiff purchased property in 1980, in McKeesport, Pennsylvania, for $2700. The City negligently demolished it in March, 1981, but offered to pay the plaintiff $15,000 in damages. Plaintiff declined the offer and instituted a civil rights action. The jury found the value of the property to be $20,000, which the district court reduced to $17,000. There is no issue in this appeal regarding this reduction.

Plaintiff then sought attorney's fees of $35,887.50, claiming that her counsel had devoted 358 hours in connection with the case, including 247.75 hours in pretrial discovery. She asserted that the services

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rendered were worth $100 or $125 per hour, depending on whether James R. Cooney, Esquire, who has been a member of the bar since November, 1980, or W. Thomas Laffy, Esquire, a member of the bar since 1972, performed those services.

The trial judge granted a counsel fee of $5,875. In justifying this fee, he disallowed all but 219 hours and valued the services at $50 per hour. The court then applied a negative multiplier because of the nature of the case. The panel has vacated the judgment of the district court regarding the fee and has remanded the matter back to the district court for entry of an order reflecting the much larger requested fee.

Given the nature of the grievance here and the cost of the property demolished, this case raises serious questions regarding a fee request that appears to be more than ten times the cost of a small piece of real estate that was destroyed. Especially troubling is the fact that almost 250 hours were claimed to have been spent by plaintiff's counsel in pretrial discovery -- that would be the equivalent of six full weeks of legal services devoted to discovery in a case involving a property acquired for $2700, and for which damages have been entered in the amount of $17,000. While we cannot evaluate the reasonableness of the fee request in the absence of a record, its disproportionate relation to the amount in controversy would appear to justify, at the very least, a remand for a reappraisal by the district court along the proper lines of analysis.

Both the judiciary and the public increasingly are becoming concerned that a portion of the legal profession seems to be more interested in the subject of fees than in performing quality legal services. This perception, if left unchecked by careful judicial scrutiny, may threaten the viability of the counsel fee statute for legitimate social ends. The question of disproportionate attorney's fees is a matter sufficiently

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serious, I believe, to command the attention of the entire Court. Moreover, this proceeding might provide an opportune occasion for the Court to refine some important aspects of the *Lindy* rule. *See Lindy Brothers, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (in banc). Since its announcement in 1976 many questions have arisen regarding its applicability which should be resolved promptly in order for the bar and the trial courts to pursue a more realistic interpretation of its salutary goals.

For all the foregoing reasons, I respectfully dissent from the order denying the petition for rehearing.

Judges Hunter, Weis, and Garth join in this dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984

In The

UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

Civil Action No. 81-1434

REBECCA L. CUNNINGHAM, an Individual,
Plaintiff,

v.

THE CITY OF McKEESPORT, WILLIAM WEISSERT, SAMUEL R. VIDNOVIC, GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES HEATHERINGTON, CHARLES A. SHARBAUGH, NICHOLAS J. SKEZAS, CAROLYN O. YOUNG and ROBERT CLYDE OMSLAER t/d/b/a OMSLAER WRECKING COMPANY,
Defendants.

MEMORANDUM OPINION

This action arose from the demolition of a house and garage without affording the owner notice or an opportunity to be heard. On August 15, 1983 a judgment for the plaintiff for $17,000 was entered. On November 29, 1983 James R. Cooney, counsel for plaintiff, moved for $33,887.50 in fees and $781.05 in costs under 42 U.S.C. §1988.

Local Rule 33 requires motions for attorney's fees to be filed within ten days after the entry of judgment, unless otherwise required to be filed prior to the entry of

judgment. This rule was effective September 15, 1983. Because the effective date of this rule was after the entry of judgment in this case, the time limitations of the rule are not applicable to this case.

In determining a fee award the Court first determines the number of hours that should reasonably have been devoted to the case. In the present case plaintiff's theory of liability and measure of damages were straightforward and no affirmative defenses were timely raised. Taking into consideration the experience of counsel, as discussed below, nonetheless the 318.5 hours spent were excessive and duplicative. The hours claimed for certain tasks will be reduced as follows:

Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984.

	Hours Claimed	*Hours Allowed*
Research	86.5	60.75
Draft complaint	12.5	6
Preparation of filing and service documents	3.25	1
Draft interrogatories and requests for production, which were not served	1.5	0
Review of discovery	1.25	0
Status conference	1.5	.5
Draft motion to compel	1.5	.5
Pretrial conference	3.75	1
Draft supplemental pretrial statement	3	1
Draft trial brief	9.5	4
Discussions with partners	9.5	0
Miscellaneous correspondence with witnesses	7	0
Trial	32	22
Discussion and research on appeal, which was not taken	4.5	0
Miscellaneous correspondence	7.5	0

Additionally, the 11.5 hours claimed for W. Thomas Laffey, Jr. will be disallowed as duplicative of Mr. Cooney's work. Thus the compensable hours are 318.5 minus 99.5 or 219.

Second, the Court determines a reasonable hourly rate. Plaintiff's counsel is a recent graduate of law school and recent member of the Bar. His relative inexperience is reflected in the number of hours devoted to this action. In *Ursic v. Bethlehem Mines*, 719 F.2d 670, 674 (3d Cir. 1983) the United States Court of Appeals for the Third Circuit took judicial notice that in the Western District of Pennsylvania a $100 hourly rate reflects a fee charged by able and experienced counsel. In the present case the reasonable hourly rate is $50. This amount encompasses some lawyering activities which would command a higher rate, such as trial time, and some which would command a lower rate, such as investigation and clerical tasks.

Multiplying the reasonable number of hours (219) times the reasonable hourly rate ($50) the lodestar is $10,950. The lodestar will not be adjusted for contingency or quality. There were no novel or complex legal or factual issues. At the outset plaintiff had a good prospect for recovery. Thus a contingency adjustment is not warranted. Plaintiff's counsel showed that degree of skill expected of lawyers of the caliber reflected in the reasonable hourly rate. Thus a quality adjustment is not warranted.

The *Lindy* amount as calculated above will be subject to a post-*Lindy* discretionary adjustment. *See, Ursic v. Bethlehem v. Mines*, 719 F.2d at 677. Plaintiff's counsel did not successfully advance new law which might serve

the public interest in the future. The decision affected only an individual plaintiff who was subject to an isolated act of deprivation for which she was adequately compensated. There was no indication of bad faith in the defense of the action. *See Swicker v. William Armstrong & Sons, Inc.*, 484 F.Supp. 762, 766 (E.D. Pa. 1980). In light of these considerations, a reduction of the *Lindy* amount by 50% to $5475 is fair and equitable in this case.

The hours spent for the prosecution of the fee petition exceeded those that should reasonably have been devoted to this task. The 15 hours claimed will be reduced to 8 hours and counsel awarded $400 for the prosecution of the fee petition.

Plaintiff's counsel will be awarded $5875 in fees and $781.05 in costs. Plaintiff had entered into a contingent fee agreement under which counsel was to receive one-third of the net amount of the award, after the payment of costs. The reasons supporting the post-*Lindy* downward adjustment indicate that this is not an appropriate case for a dual recovery. Accordingly plaintiff's obligations under the fee agreement are deemed satisfied in full by the statutory fee award. *See Sullivan v. Crown Paper Board Co., Inc.*, 719 F.2d 667 (3d Cir. 1983).

An appropriate order shall issue.

Dated: March 19, 1984.

HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
Chief United States District Judge

Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984.

ORDER

AND NOW March 19, 1984 in accordance with the foregoing memorandum opinion, IT IS HEREBY ORDERED that plaintiff's counsel is awarded $5875 in fees and $781.05 in costs.

HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
Chief United States District Judge

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Office-Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1793

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE CITY OF MCKEESPORT and
WILLIAM WEISSERT,
Petitioners,

v.

REBECCA L. CUNNINGHAM, an individual,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

The Respondent, Rebecca L. Cunningham (CUNNINGHAM), commenced the within civil rights action pursuant to 42 U.S.C. Section 1983 against the Petitioners, the City of McKeesport (McKEESPORT) and its building inspector, William Weissert, in August of 1981. The relevant facts underlying the dispute between the parties may be summarized as follows:

In November of 1980, CUNNINGHAM purchased a house and garage in the City of McKeesport from the U.S. Department of Housing and Urban Development. Following completion of minor repairs, CUNNINGHAM applied for a subsidized loan through the Improvement Program of Allegheny County (IMPAC) in order to renovate the property. In February of 1981, IMPAC approved CUNNINGHAM's application for a $15,000.00 loan, to be repaid in 15 years without interest. In addition, CUNNINGHAM entered into a contract for the renovation of her property for $15,000.00. However, before the work could be started, and without prior notice to CUNNINGHAM, McKEESPORT totally demolished CUNNINGHAM's house and garage.

To seek redress, CUNNINGHAM contacted the law firm of NERNBERG & LAFFEY, who agreed to accept her case on a contingency fee basis. NERNBERG & LAFFEY thereafter filed a Complaint against McKEESPORT, who was responsible for the demolition, its building inspector, who authorized the demolition, the members of McKEESPORT City Council, who were required to approve the actions of the building inspector, and the demolition contractor. The Complaint alleged that Defendants had violated CUNNINGHAM's rights under 42 U.S.C. Section 1983, by depriving her of property without due process of law, and requested damages for the following:

A. Loss of her house and garage which would have had a post-renovation market value in excess of $40,000.00;

B. Loss of use of the house as a residence;

C. Loss of the opportunity to receive a $15,000.00 interest free loan; and

D. Damages for emotional distress and punitive damages.

The law firm of TRUSHEL, WOOD & ISRAEL entered an appearance on behalf of Petitioners and filed an Answer denying liability and asserting that the District Court lacked subject matter jurisdiction. Petitioners later filed an Amended Answer asserting the defense of immunity. The parties thereafter engaged in extensive discovery, and in June of 1982, met for the preparation and filing of a Joint Pretrial Stipulation. In the Pretrial, Defendants again denied liability and contested the jurisdiction of the Court. The parties continued to engage in discovery, and in September of 1982, met for a Pretrial Conference before the District Court. At the Pretrial, the District Judge ordered briefs to be filed on a number of issues and required that the parties submit Proposed Points for Charge with legal citations, substantially in advance of trial. Trial was scheduled for April of 1983, and from September through April, the parties continued with discovery. In addition, since Petitioners continued to contest liability and jurisdiction, and at no time made a concrete offer to settle the case, Respondent engaged in extensive preparation for trial.

Trial began in April of 1983 and continued for four days. The evidence which unfolded at trial indicated both a widespread abuse of the procedures employed by McKEESPORT for the demolition of property as well as a total disregard of CUNNINGHAM's due process rights. Thus, although McKEESPORT's ordinance which permitted it to demolish "dangerous properties"

required the building inspector to notify the property owner of the city's intention to demolish, the building inspector admitted that he had not personally notified an owner since 1976. Although the ordinance required the building inspector to examine public records found in the Registrar of Deeds to determine the record owners of the property, the building inspector testified that he did not have time for such duties, but merely assumed that someone else in his office had verified ownership. However, the building inspector admitted that he made no efforts to review or verify their findings, if in fact there were any. In fact, none of the witnesses who testified on behalf of McKEESPORT were able to identify what efforts were made to notify CUNNINGHAM of the proposed demolition. In addition, although the ordinance in question permitted demolition of "dangerous" buildings only, McKEESPORT was unable to establish that CUNNINGHAM's house was in fact dangerous. The building inspector testified that he slated the house for demolition due to a fire which had occurred years earlier. Although the building inspector stated that no fire damage was visible from the outside of the building, he admitted that he had never seen the inside. Moreover, although the so-called "fact-finding hearing" conducted with respect to the property concluded that the building inspector should examine the inside of the house prior to authorizing demolition, he admitted that he neglected to do the same since "he did not have time".

On the basis of the above evidence, counsel for Respondent requested an instruction on punitive damages which was refused by the District Court. The District Court then submitted the case to the jury on special interrogatories which permitted them to award damages for the pre-demolition value of the house, the loss of the $15,000.00 no-interest loan and emotional distress. The jury thereafter returned a verdict in favor of CUNNINGHAM in the amount of $35,000.00, allocating $20,000.00 for CUNNINGHAM's loss of the house and

$15,000.00 for loss of the no-interest loan. In addition, by virtue of Answers to Special Interrogatories, the jury specifically found that Respondents had violated CUNNINGHAM's civil and constitutional rights. Both parties filed post-trial motions, and as a result of the same, the District Court entered an Order reducing the jury's verdict to $17,000.00. The aforesaid reduction was based upon the District Court's opinion that damages for loss of the loan had been improperly submitted to the jury and that the testimony concerning the pre-demolition market value of the house could not support a verdict in excess of $17,000.00. CUNNINGHAM thereafter met with the members of NERNBERG & LAFFEY who advised her to appeal as they believed the District Court had erred in excluding certain elements of damages from the jury's consideration as well as in reducing the verdict. However, CUNNINGHAM chose not to appeal since she was in need of money and desired the "quickest possible resolution of the case."

NERNBERG & LAFFEY thereafter filed a Motion for Counsel Fees pursuant to 42 U.S.C. Section 1988, as well as an extensive Affidavit, based upon actual time records, detailing the items of work performed and the time spent for each. Petitioners did not file an Affidavit in opposition to the Motion for Counsel Fees, nor did they seek an opportunity to examine the members of NERNBERG & LAFFEY on the accuracy of the Affidavit. Instead, Petitioners merely filed a brief asserting that CUNNINGHAM was entitled to no fees since she had entered into a contingent fee arrangement, or in the alternative, since her case did not advance the civil rights of the public at large. Although the Affidavit in Support of the Motion for Counsel Fees was uncontradicted, and no hearing was requested with respect to the same, the District Court reduced the hours for which compensation was awarded by approximately one-third (⅓), cut the hourly rate requested in half, from $100.00 per hour to $50.00 per hour, and finally reduced the resulting

lodestar amount by fifty (50%) percent since "the decision affected only an individual plaintiff."

CUNNINGHAM appealed the District Court's Order regarding Counsel Fees to the United States Court of Appeals for the Third Circuit. Following the submission of briefs and oral argument before a panel of the Third Circuit, the panel issued an Opinion and Order reversing the judgment of the District Court and remanding the case for entry of judgment for the lodestar amount requested. Petitioners filed a Petition for Rehearing which was denied by the Court En Banc. The within Petition for Writ of Certiorari before this Honorable Court foliowed.

SUMMARY OF ARGUMENT

The law is clear that the number of hours reasonably expended upon a case as well as the reasonableness of the hourly rate requested in a Petition for Attorneys' Fees are questions of fact. Since Petitioners failed to submit any evidence to the District Court to challenge the accuracy and reasonableness of the hours charged and hourly rate requested by Respondent, no factual issues were raised and thus Petitioners have waived these arguments.

The District Court made a downward adjustment to the lodestar of fifty (50%) percent since it found that the litigation benefitted only a single plaintiff. Since such finding was not supported by the record and would not justify a downward adjustment to the lodestar even if true, the Third Circuit properly reversed the District Court and remanded the case for entry of judgment for the lodestar amount.

ARGUMENT

I. PETITIONERS' FAILURE TO CHALLENGE THE REASONABLENESS OF THE HOURS EXPENDED AND HOURLY RATE REQUESTED IN THE DISTRICT COURT CONSTITUTED A WAIVER OF THESE ISSUES.

As previously set forth, Petitioners failed to file an Affidavit in Opposition to Respondent's Motion for Counsel Fees, nor did they request a hearing to challenge the accuracy of Respondent's Affidavit setting forth the hours expended, the necessity for their expenditure and the hourly rate requested. As a result, the Third Circuit held that the District Court erred in reducing these items since Petitioners failed to challenge them:

> . . . when an opposing party has been afforded the opportunity to raise a material fact issue as to the accuracy of representations as to hours spent, or the necessity for their expenditure, and declines to do so, no reason occurs to us for permitting the trial court to disregard uncontested affidavits filed by a fee applicant (Appendix, 8a)
>
> . . . we have consistently held that the lodestar calculation must be based on historical time charges for individual attorneys. What those time charges are is a factual question. Since Cooney's Affidavit is uncontradicted, there is no material issue of fact (Appendix, 10a)

Since the Third Circuit's holding is amply supported by precedent from both this Court as well as other decisions in the Third Circuit, it must be upheld.

A case directly on point is this Court's recent decision in *Blum v. Stenson*, ____U.S. ____, 104 S. Ct. 1541, ____L. Ed.2d ____(1984). In *Blum*, the Petitioner was contesting a fee award made pursuant to 42 U.S.C. Section 1988 to a legal aid society. Although the main thrust

of Petitioner's argument was that fee awards to legal aid societies should be based upon cost rather than on prevailing market rates, Petitioner also argued that the number of hours requested by the Respondent's counsel were unreasonable. However, since the Petitioner failed to submit evidence in the District Court to support his claim that the hours charged were unreasonable, this Honorable Court refused to consider the issue. As set forth in the Opinion of Justice Powell:

> We decline to consider the petitioner's further argument that the hours charged by respondents' counsel were unreasonable. As noted above, petitioner failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, see *Hensley*, supra. ____U.S., at ____, 103 S.Ct. at 1039, or the facts asserted in the affidavits submitted by respondents' counsel. It therefore waived its right to an evidentiary hearing in the District Court. See *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 472-473 (CA2 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award). In view of the trial strategy it choose, petitioner waived its right to challenge in this Court the District Court's determination that the number of hours billed were reasonable for cases of similar complexity.

104 S.Ct. at 1554.

In addition, the Third Circuit's holding in the present case is amply supported by previous decisions in both the Third Circuit and other circuits. See, for example, *Danny Kresky Enterprises Corporation v. Magid*, 716 F.2d 215, 219 (3rd Cir., 1983). See also, *Wheatly v. Ford*, 679 F.2d 1037, 1040 (2nd Cir. 1982): "Because defendants do not contest the number of hours or the hourly rates claimed by the plaintiff's attorney, the appropriateness of the lodestar figure is not at issue."

Throughout their Brief, Petitioners urgently insist that the fee award in the present case is not compensatory but punitive, and that a gross injustice will occur if the holding of the Third Circuit is permitted to stand. Thus, Petitioners now assert that CUNNINGHAM's prosecution of the case was unreasonable since she demanded damages that were greatly in excess of the $17,000.00 ultimately awarded. However, the jury awarded CUNNINGHAM $35,000.00, and was not even permitted to consider a number of damage items which were supported by the evidence, including punitive damages. Althugh the District Court ultimately reduced the award to $17,000.00, counsel for CUNNINGHAM at all times advised her that the reduction was improper and should have been appealed. In fact, in its Opinion reversing the District Court's fee award, the Third Circuit agreed that "the verdict would support a judgment in Cunningham's favor for $35,000.00" (Appendix, 4a). In addition, Petitioners assert that CUNNINGHAM unreasonably refused their settlement offers causing fees to be inflated. However, this statement is patently untrue in that Petitioners did not even make a concrete settlement offer until the day before trial, when most of the work on behalf of CUNNINGHAM had already been done. Moreover, this argument should not even be considered since none of the settlement discussions have ever been made a part of the record in this case. Finally, as set forth in the above authorities, any perceived impropriety in the award was caused by Petitioners' own failure to properly challenge the fees requested in the District Court. Thus, the Petition for Writ of Certiorari must be denied.

II. THE THIRD CIRCUIT'S OPINION IS IN FULL ACCORDANCE WITH THE STANDARDS FOR REVIEW ESTABLISHED FOR ATTORNEYS' FEES CASES.

Petitioners vigorously contend that since the amount of a fee award is within the discretion of the District Court, the Third Circuit "substituted its judgment" for that of the District Court in reversing the deductions made from Respondent's fee request. However, although an attorneys' fee award is in fact within the discretion of the District Court, the law is clear that the District Court abuses such discretion when it relies upon improper factors in making its fee determination. See, *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1941, 76 L.Ed 2d 40 (1983); *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3rd Cir., 1983).

In the present case, the District Court made a fifty (50%) percent downward adjustment to the lodestar amount solely because "The decision affected only an individual plaintiff who was subject to an isolated act of deprivation for which she was adequately compensated. There was no indication of bad faith in the defense of the action" (Appendix, 23a). Initially, it should be noted that such finding was not supported by the record in the case, but on the contrary, the evidence indicated that the procedures employed by the Petitioners for the demolition of property had been constitutionally defective since at least 1976. Although Respondent did not attempt to prove that Petitioners violated the due process rights of other specific property owners, it is certain that Petitioners will be more careful to respect such rights when demolishing properties in the future as the result of this case. Moreover, the factors relied upon by the District Court to reduce the lodestar are clearly improper factors in the determination of statutory attorneys' fees pursuant to 42 U.S.C. Section 1988. As stated by this Honorable Court in *Blum v. Stenson*, supra.:

> Nor do we believe that the number of persons benefited is a consideration of significance in calculating fees under Section 1988. Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under Section 1988 reflects the amount of attorney time reasonably expended on the litigation. Presumably counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.

104 S.Ct. at 1549-1550.

In the instant case, the Third Circuit very assiduously considered each of the reasons assigned by the District Court to justify its decision. It carefully pointed out in each instance how and why the District Court applied improper factors in reaching its award. It also found that there was no evidence in the record to support the District Court's discretionary adjustment to either the hours and hourly rate requested or the lodestar amount. As such, the Third Circuit found that the subjective adjustment of the award was an arbitrary abuse of discretion by the District Court. Its decision therefore was clearly not a substitution of its judgment for that of the District Court, but was an application of the proper standard of review of an award of attorneys' fees.

CONCLUSION

In conclusion, it is respectfully requested that this Honorable Court dismiss the Petition for Writ of Certiorari and remand the case to the District Court for the entry of judgment.

Respectfully submitted,

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